Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1314

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1982 TERM

GREGORY RICHARD FOGARTY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the period during which his co-defendants' pre-trial motions were pending should have been automatically excluded from the defendant's seventy-day time limit for commencement of trial under the Speedy Trial Act.

2. Whether the trial court violated the dictates of the Speedy Trial Act by delaying the defendant's trial for thirty days, supposedly to serve the "ends of justice," though the defendant and the Government were fully prepared and stood ready to go to trial with no delay.

3. Whether a fifty-day delay in commencing the defendant's trial was unreasonable under Section 3161(h)(7) of the Speedy Trial Act and violated his constitutional right to a speedy trial, where the defendant demanded a prompt trial and where both the defendant and the Government were fully prepared and stood ready to proceed to trial with no delay.

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2. Whether the trial court violated the dictates of the Speedy Trial Act by delaying the defendant's trial for thirty days, supposedly to serve the "ends of justice," though the defendant and the Government were fully prepared and stood ready to go to trial with no delay.

3. Whether a fifty-day delay in commencing the defendant's trial was unreasonable under Section 3161(h)(7) of the Speedy Trial Act and violated his constitutional right to a speedy trial, where the defendant demanded a prompt trial and where both the defendant and the Government were fully prepared and stood ready to proceed to trial with no delay.

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 692 F.2d 542 (8th Cir. 1982), and attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

On November 10, 1982, the United States Court of Appeals for the Eighth Circuit filed its opinion in the instant case, affirming the district court's judgment. On December 9, 1982, the United States Court of Appeals for the Eighth Circuit entered its Order denying Defendant's Petition for Rehearing. 28 U.S.C. Section 1254 confers on this Court jurisdiction to review the decision of the court of appeals by Writ of Certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) U.S. CONST. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(2) 18 U.S.C. Section 3161(c)(1): In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever

date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(3) 18 U.S.C. Section 3161(h): The following periods of delay shall be excluded in computing the time within which an informtion or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from

trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transporation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(4) 18 U.S.C. Section 3161(h)(7): A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(5) 18 U.S.C. Section 3161(h)(8): (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless

the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (a) of this paragraph in any case are as follows:

(i) Whether the failure to grant suh a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

IN THE
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No. _____
OCTOBER 1982 TERM

GREGORY RICHARD FOGARTY,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE UNITED STATES COURT OF APPEALS
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STATEMENT OF THE CASE

On January 20, 1980, an aircraft transporting marijuana landed in South Dakota and was seized by law enforcement officers.

In connection with this incident, a federal grand jury handed down an indictment on August 19, 1981, charging Petitioner Gregory Richard Fogarty with one count of conspiracy to import marijuana in violation of 21 U.S.C. Sections 952(a) and 963, and one count of conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. Sections 841(a)(1) and 846. Federal jurisdiction in the United States District Court for the District of South Dakota, Northern Division, was based on 18 U.S.C. Section 3231 and Fed.R.Crim.P. 18. Petitioner was arraigned before the Honorable Carlyle E. Richards, United States Magistrate, on September 8, 1981. In a letter dated October 7, 1981, Special Assistant U.S. Attorney James McMahon advised the Honorable Donald J. Porter, United States District Court Judge for the District of South Dakota, Northern

Division, that the Speedy Trial Act deadline for trial was November 16, 1981 (see Appendix C). Mr. McMahon further indicated in his letter that "it is our position that the trial should be held before that date unless defense counsel are successful on a Motion to Continue." Nonetheless, on November 2, 1981, in the absence of any ruling on motions to continue, Judge Porter scheduled the trial of Petitioner and his co-defendants for December 7, 1981.

During late October and early November, three co-defendants filed motions to continue the trial, but Petitioner specifically did not join in any of these motions. In the Government's response to the co-defendants' motions for continuance, Mr. McMahon stated that "Defendants Halgrimson, Maiers, and Dennis Fogarty have moved for a continuance. The Government is prepared and stands ready

to go to trial in this matter on December 7, 1981." (See Appendix D; emphasis added.)

On November 16, 1981, Petitioner filed a motion to dismiss the indictment for failure to comply with the Speedy Trial Act of 1974, 18 U.S.C. Sections 3161-3174 (1976), and a motion to sever his trial from that of the other defendants. Prior to hearing these motions, Judge Porter granted the three co-defendants' motions to continue the trial and delayed the trial of all defendants from December 7, 1981 until January 6, 1982 (Order of November 24, 1981). On December 10, 1981, Judge Porter heard and denied Petitioner's motion to dismiss and motion to sever and reaffirmed his decision to continue the trial date of all defendants, including Petitioner, from December 7, 1981 until January 6, 1982 (see Appendix B).

On January 6, 1982, Petitioner's co-defendants pled guilty under plea bargain

agreements. On the same day, Petitioner was tried at a bench trial before Judge Porter pursuant to stipulated facts and was convicted on all charges. At trial, Petitioner specifically preserved his right to raise the Speedy Trial Act issue on appeal.

ARGUMENT

I. THE SPEEDY TRIAL ACT REQUIRES DISMISSAL OF THE INDICTMENT AGAINST PETITIONER.

The Speedy Trial Act, 18 U.S.C. Sections 3161-3174, was enacted to effectuate the Sixth Amendment's speedy trial requirement by guaranteeing prompt consideration and disposition of criminal cases. The Act sets forth strict time limits within which a defendant's indictment, arraignment and trial

must occur, and mandates sanctions for violation of those time limits. Specifically, 18 U.S.C. 3161(c)(1) reads in pertinent part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. (Emphasis added.)

The prescribed sanction for failure to comply with the strict terms of this section is contained in 18 U.S.C. Section 3162(a)(2):

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. (Emphasis added.)

According to 18 U.S.C. Section 3163(c), this sanction of dismissal applies with full effect to all indictments filed on or after

July 1, 1980. Thus, the mandates of the Act are to be strictly applied in the instant case.

The Eighth Circuit properly calculated that since Mr. Fogarty's arraignment occurred on September 8, 1981 and started his seventy-day count, a timely trial would have begun on November 16, 1981, barring periods of excludable delay. United States v. Fogarty, 692 F.2d 542, 545 (8th Cir. 1982). While Mr. Fogarty's trial did not actually commence until 120 days after his arraignment, the Eighth Circuit concluded that two of the"excludable time" provisions of Section 3161(h) of the Act applied in Petitioner's case to bring his trial within the seventy-day limit. 692 F.2d at 545, 546. Petitioner contends that neither of those provisions are applicable in his case, and that the fifty-day delay in the commencement of his trial was

unreasonable under the circumstances of his case.

A. The period during which his co-defendants' pretrial motions were pending should not have been excluded from Petitioner's seventy-day time limit for commencement of trial.

Citing United States v. Brim, 630 F.2d 1307, 1312-13, (8th Cir.), cert. denied, 452 U.S. 966 (1980), the Eighth Circuit concluded that Section 3161(h)(1)(F) (as amended 1979) of the Speedy Trial Act requires automatic exclusion of the sixty-one days during which co-defendants' pretrial motions were continuously pending. 692 F.2d at 545. In Brim, however, the defendant's deadline period was tolled by motions brought by Brim and by Government motions directly relating to Brim. A thorough examination and analysis of the language of Section 3161(h) reveals that

Section 3161(h)(1)(F) was not meant to apply to motions brought by, and related to, co-defendants:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
>
> (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
>
> (B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;
>
> (C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;
>
> (D) delay resulting from trial with respect to other charges against the defendant;
>
> (E) delay resulting from any interlocutory appeal;
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing

> on, or other prompt disposition of, such motion;
>
> * * *

(Emphasis added)

In the instant case, Petitioner's co-defendants filed pretrial motions on October 15, 1981. The Eighth Circuit obviously concluded that these pretrial motions "concerned the defendant" Fogarty for purposes of Section 3161(h)(1)(F) and required the tolling of Mr. Fogarty's seventy-day count as of October 15, 1981. However, it is clear from a reading of the statute's examples of "other proceedings concerning the defendant" that pretrial motions of co-defendants do not toll the running of a defendant's seventy-day count. Rather, the examples within the statute refer to other proceedings which directly involve the particular defendant, himself.

Further, an examination of Section 3161(h)(7) confirms this interpretation. That section provides:

> (h) The following periods of delay shall be excluded in computing the time within which . . . the trial of any such offense must commence:
>
> > (7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

Citing United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980), and United States v. Manbeck, 514 F.Supp. 152, 154-55 (D. S.C. 1981), the Eighth Circuit interpreted this section to mean that an exclusion applicable to one defendant applies to all co-defendants. 692 F.2d at 546. In fact, the inclusion of this section along with Section 3161(h)(1)(F) clearly reflects just the contrary. If the "other proceedings concerning

the defendant" of Section 3161(h)(1) automatically included all proceedings of co-defendants, Section 3161(h)(7) would be redundant and unnecessary; there would be no need for reference to a "reasonable delay" because a defendant's trial deadline would always track precisely with the latest deadline applicable to any of his respective co-defendants.

The delay from October 15, 1981 until December 22, 1981, occasioned by the co-defendants' continuance motions should not have been excluded in computing Mr. Fogarty's seventy-day count. Rather, that delay was only excludable as to the co-defendants who brought the motions. These motions did toll the running of the co-defendants' seventy-day counts so that the time for their trials had not run on November 16, 1981. However, under Section 3161(h)(7), this only meant that a "reasonable period of delay" could be added

to Mr. Fogarty's seventy-day count without violating his constitutional right to a speedy trial.

B. The trial court violated the dictates of the Speedy Trial Act by delaying Petitioner's trial for thirty days, supposedly to serve the "ends of justice," though Petitioner and the Government were fully prepared and stood ready to go to trial with no delay.

The Eighth Circuit also concluded that the "excludable time" provision of Section 3161(h)(8)(A) applied in the instant case to the thirty-day delay resulting from the district court's continuance of the trial date from December 7, 1981 to January 6, 1982. 692 F.2d at 546. Section 3161(h)(8)(A) empowers the judge to grant a continuance motion if he finds that the "ends of justice" so require. On November 24, 1981, the trial court granted co-defendants' motions for con-

tinuance and reset the trial of all defendants for January 6, 1982. However, while this thirty-day delay may properly be excluded from the co-defendants' seventy-day counts, it certainly should not be excluded from Mr. Fogarty's time limit for trial.

As the Eighth Circuit noted in its opinion, 692 F.2d at 546, under Section 3161(h)(8) such a continuance is properly excluded from the computation of trial days

> if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. Section 3161(h)(8)(A) (emphasis added). The "ends of justice" are often served by a delay when further time is needed in order to ensure adequate preparation for trial by both sides. See Sections 3161(h)(8)(B)(ii) and (iv). Indeed, this was the basis

for the continuance sought by the co-defendants in the instant case, and this was the basis on which the trial court continued the trial date for all defendants, including Petitioner. 692 F.2d at 546. However, these considerations have nothing to do with the defendant, Mr. Fogarty. He did not join in the co-defendants' motions for continuance. He made every effort to have his case heard within the seventy-day period prescribed by the Act. Nor did the Government require this thirty-day continuance in order to fully prepare for Mr. Fogarty's trial, as is evidenced by the Government's response to the co-defendants' motions for continuance, wherein it was stated that "[t]he Government is prepared and stands ready to go to trial in this matter on December 7, 1981." As to Mr. Fogarty, the ends of justice were in no way served by a continuance of his trial, and the

thirty-day delay until January 6, 1982, should not be deemed "excludable time" within the time limit for his trial.

Moreover, the continuance from December 7, 1981 to January 6, 1982 had no validity as to Mr. Fogarty because it was granted after his applicable trial deadline had passed. His deadline for trial was November 16, 1981. He was ready for trial by that day, as was the Government, and he had indi-cated his desire for a prompt trial by moving on November 16, 1981 to dismiss for failure to bring the case promptly to trial and by moving to sever his trial from that of the co-defendants who were seeking a continuance. However, on November 24, 1981, the trial court issued an Order continuing Fogarty's trial date from its proposed December 7, 1981 date to January 6, 1982, pursuant to Section 3161(h)(8). It is improper for a court to

grant permission for such an extension after a defendant's applicable trial deadline has passed, and this continuance was invalid as to Mr. Fogarty. United States v. Didier, 542 F.2d 1182, 1189 (2d Cir. 1976); accord, United States v. Mack, 511 F.Supp. 802, 803 (D.C. Mass. 1981). With regard to Petitioner, the fifty-day delay between November 16, 1981 and January 6, 1982 in no way served "the ends of justice." Rather, this delay simply thwarted the best interests of the public and the defendant in a speedy trial, and violated the spirit and the letter of the Speedy Trial Act.

C. Continuance of the trial date to January 6, 1982 represented an unreasonable period of delay under Section 3161 (h)(7) of the Speedy Trial Act and denied Petitioner his constitutional right to a speedy trial.

Section 3161(c)(1) of the Speedy Trial Act required that Fogarty's trial commence within seventy-days of his arraignment on September 8, 1981. Pursuant to Section 3162(a)(2) of the Act, the prescribed sanction for failure to comply with the strict terms of this time limit is dismissal of the indictment. The sanctions of the Act are to be strictly applied. Thus, in United States v. Mack, 511 F.Supp. 802 (D.C. Mass. 1981), an indictment was dismissed with prejudice when the defendant filed a motion for dismissal forty-five days after his statutory trial deadline had expired. 511 F.Supp. at 803. See also, United States v. Garza, 502 F.Supp. 537 (D.C.S.D. Tex. 1980). Because three of Fogarty's co-defendants filed pretrial motions on their own behalves in October and November of 1981, those co-defendants' respective deadlines for trial were properly

extended beyond November 16, 1981, pursuant to Section 3161(h)(1)(F). As to Defendant Fogarty, this circumstance meant that the trial court might properly add to his seventy-day deadline "a reasonable period of delay," pursuant to Section 3161(h)(7). The totality of the circumstances reflect that the fifty-day delay suffered by Mr. Fogarty was unreasonable and that his Sixth Amendment right to a speedy trial was denied.

The United States Court of Appeals for the Second Circuit shed considerable light on this "reasonableness" standard in its discussion in United States v. Didier, 542 F.2d 1182 (2d Cir. 1976). As in this case, Didier's trial was delayed a number of times because of circumstances involving his co-defendants. Initially, the Government wished to postpone Didier's trial until disposition of a co-defendant's appeal on another charge

in another jurisdiction. Later, further delay occurred when the same co-defendant disappeared and could not be relocated for trial. Meanwhile, Didier had brought a motion to dismiss his indictment for failure to promptly commence his trial. The trial court denied his motion, holding that the delays in commencing Didier's trial were justified by the circumstances surrounding the co-defendant. 542 F.2d at 1185. The Second Circuit concluded that these delays in commencement of Didier's trial were unreasonable and remanded his case for dismissal of the indictment.

> Upon being put on notice by appellant's June 30th motion [to dismiss] that he was in effect demanding a prompt trial and then being further advised on July 17th that [the co-defendant] had probably gone fugitive, the district court should have sua sponte severed appellant's case for immediate retrial. (Emphasis added).

542 F.2d at 1188. Later in the same opinion, the court again emphasized that a motion by a defendant to dismiss for failure to bring his case promptly to trial represents an indication on his part of his desire for a prompt trial, 542 F.2d at 1189, and the court must consider this desire in determining the reasonableness of further delay.

In accord is United States v. Lasker, 481 F.2d 229 (2d Cir.), cert. denied, 415 U.S. 975 (1973). In outlining the proper procedures to follow under a court rule which, precisely like Section 3161(h) (7), allowed for reasonable delay when a defendant was joined for trial with a co-defendant whose time for trial had not yet run, the court adopted the following approach:

> 1. Determine whether the defendant is joined with a co-defendant as to whom the [time limit] has not run;

> 2. If the first requisite is met, determine whether any further delay would be unreasonable under the circumstances -- not determine retroactively whether the previous delay was unreasonable; and
>
> 3. Determine whether independently of the reasonableness of future delay, there is good cause for a severance. If the court determines either that further delay would be unreasonable or that there is good cause for a severance, . . . it should then sever the defendant's case so that defendant's [time limit] would henceforth run independently of his co-defendant. (Emphasis added).

481 F.2d at 233-34. In the Lasker case, the Second Circuit concluded that the trial court had acted improperly:

> [I]t should have found that, under the circumstances of [co-defendant's] likely continued unavailability, any further delay under the auspices of Rule 5(e) [i.e., the "reasonable period of delay" rule] would have been unreasonable and thus should have severed [co-defendant] from each defendant's indictment so that trial could proceed forthwith, as the government assured the court it was pre-

pared to do. (Emphasis added).

481 F.2d at 234.

As in Didier and Lasker, the totality of the circumstances indicate that Mr. Fogarty's trial was unreasonably delayed and that he was denied his constitutional right to a speedy trial. Fogarty was arraigned on September 8, 1981, as were his co-defendants. He should have been tried by November 16, 1981. Both Fogarty and the Government were ready to commence trial by November 16th. While his co-defendants brought motions in mid-October and early November to continue their trials to a later date, Fogarty did not join in these motions but sought severance and a speedy trial instead. Nonetheless, on November 2, 1981, even before it had ruled on the co-defendants' motions to continue, the trial court set December 7, 1981 as the trial date for all defendants, including Fogarty.

This date, of course, was well beyond his seventy-day deadline of November 16, 1981. On November 16th, Fogarty filed his own motions to dismiss his indictment for failure to comply with the Speedy Trial Act and sever his trial from that of the other defendants. With these motions, he again indicated his desire for a prompt trial. United States v. Didier, 542 F.2d at 1189. At the same time, the Government was prepared and ready to proceed to trial against Mr. Fogarty. However, the trial court not only refused to sever Fogarty's trial and commence immediately, but on November 24, 1981, further continued his trial and that of his co-defendants to January 6, 1982. [It is perhaps not insignificant that Fogarty's four co-defendants, who claimed they needed a continuance to prepare for trial, all pled guilty to charges on January 6, 1982, and Fogarty was tried alone

on that date, fifty days after the deadline for his trial which both he and the Government were prepared to meet.]

This factual pattern reflects that there were no "ends of justice" to be served by the delays in commencing Mr. Fogarty's trial. The trial court justified the continuance of Mr. Fogarty's trial on the basis of needed time for further preparation, though Fogarty and the Government were prepared and ready to proceed. The court refused to sever, though the co-defendants were unprepared to proceed and made every effort to postpone trial, only to plead guilty before the final trial date. The fifty-day delay in Mr. Fogarty's trial was unreasonable, and reflects a disregard for his rights, and for society's right to a speedy trial. United States v. Didier, 542 F.2d at 1188, n. 7. Fogarty's indictment should be ordered dismissed by this Court, so as to vindicate the

individual's and the public's interest in the prompt resolution of criminal charges. United States v. Lasker, 481 F.2d at 234.

CONCLUSION

For the reasons set forth above, this court should declare that the fifty-day delay in commencing Petitioner's trial violated his constitutional right to a speedy trial and should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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